

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF HAWAII
3
4 A.B. and A.M.B., by their) CV 18-00477LEK-RT
5 parents and next friends,)
6 C.B. and D.B., and T.T.,)
7 by her parents and next) Honolulu, Hawaii
8 friends, K.T. and S.T.,) September 19, 2019
9))
10 Plaintiffs,) (59-1) MOTION TO CERTIFY
11) CLASS
12 vs.)
13))
14 HAWAII STATE DEPARTMENT OF)
15 EDUCATION and OAHU)
16 INTERSCHOLASTIC ASSOCIATION,)
17))
18 Defendants.)
19)
20)
21)
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25)

12 TRANSCRIPT OF PROCEEDINGS
13 BEFORE THE HONORABLE LESLIE E. KOBAYASHI
14 UNITED STATES DISTRICT JUDGE

15 APPEARANCES:

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25 Proceedings recorded by machine shorthand, transcript produced
with computer-aided transcription (CAT).

1 THURSDAY, SEPTEMBER 21, 2019 2:45 P.M.

2 THE COURTROOM MANAGER: Civil No. 18-00477 LEK-RT,
3 A.B., by her parents and next friends, C.B. and D.B., et al.,
4 versus Hawaii State Department of Education, et al.

5 This case has been called for a hearing on Plaintiffs'
6 Motion for Class Certification and Defendant Hawaii State
7 Department of Education's Motion to Dismiss Plaintiffs' First
8 Amended Complaint for Declaratory and Injunctive Relief.

9 Counsel, your appearances for the record, please. Please
10 speak into a microphone.

11 MR. CABALLERO: Mateo Caballero from the ACLU of
12 Hawaii, and with me are Elizabeth Kristen from Legal Aid At
13 Work and Jayma Meyer from Simpson Thacher & Bartlett on behalf
14 of plaintiffs.

15 THE COURT: Good afternoon to all of you.

16 MR. CABALLERO: Good afternoon.

17 THE COURT: Mr. Moser?

18 MR. MOSER: Good afternoon, Your Honor.

19 Kendall Moser and William Awong from the Department of the
20 Attorney General. We represent Defendant Department of
21 Education.

22 THE COURT: All right. Good afternoon to both of
23 you.

24 Ms. Nakamura.

25 MS. NAKAMURA: Good afternoon, Your Honor.

1 Lauren Nakamura and Lyle Hosoda on behalf of Defendant
2 Oahu Interscholastic Association.

3 THE COURT: All right. Good afternoon to both of
4 you as well. You may be seated.

5 I apologize for not getting a written inclination
6 out. Mr. Hosoda knows we've been in trial for quite some time
7 so -- on various trials, so I'm going to read an oral
8 inclination and then I invite oral argument with regard to my
9 inclination.

10 So as to Plaintiffs' Motion for Class Certification, the
11 court is inclined to find that plaintiffs seek to represent a
12 class and they are therefore required to satisfy the threshold
13 requirements of Rule 23(a) which provides that a case is
14 appropriate for certification if:

- 15 1. the class is so numerous;
- 16 2. there are questions of law or fact common to the
17 class;
- 18 3. the claims or defenses of the representative parties
19 are typical of the claims and defenses of the class; and
- 20 4. the representative parties will fairly and adequately
21 protect the interests of the class.

22 In addition, the plaintiffs here are seeking injunctive
23 and declaratory relief, so therefore, Rule 23(b)(2) applies,
24 and they have to meet the requirements of that as well.
25 Plaintiffs, of course, seek the burden -- or bear the burden of

1 demonstrating they satisfy each of the Rule 23 requirements at
2 issue.

3 So what the plaintiffs want to do here is they're asking
4 the court to certify a class of present and future Campbell
5 High School female students who are being discriminated against
6 on the basis of sex by the Department of Education and the Oahu
7 Interscholastic Association and are being retaliated against by
8 the Department of Education for complaining about
9 discrimination. That is the gravamen of their intentions.

10 First, the court addresses the issue of mootness which I
11 think has been raised, sort of confusing it with standing. But
12 with regard to the issue of mootness, the court is inclined to
13 find that the plaintiffs' claims are inherently transitory
14 enough and that the harm will most certainly repeat in the
15 future. In these types of cases, the named plaintiffs' here
16 claim is capable of repetition yet evading review. Therefore,
17 the court's inclined to find that this exception to mootness
18 exists in this case.

19 Now, as to numerosity, I do have a few questions for the
20 plaintiffs' counsel, so if you could address it at that time.
21 Based on your representation in the pleading or on the motion,
22 you've indicated there are hundreds of potential members
23 because of the number of female students who are or will be
24 athletes at Campbell High School. In the motion you provided a
25 table of female athletes for the 2016 to '17 school year which

1 was 279 which was represented; for the 2017 to 2018 school year
2 it's represented the number's 269; and for the 200 -- I mean,
3 2018 to 2019 school year, the number represented is 198. So if
4 that's correct, then that would support that there are hundreds
5 of potential members and therefore I'm inclined to find that
6 that's sufficient to meet numerosity.

7 But when I looked at Exhibit A and Exhibit B to the
8 motion, it supported that there are an average of 3,106 -- I'm
9 sorry -- 3,104 students enrolled for school years -- or that's
10 the average for school years 2015 to 2016 and 2018 to 2019, and
11 there's support that the female students constitute 48 percent
12 of the student body. So that would be approximately 1,490
13 students.

14 But it doesn't tell me where you get this information
15 about the female athletes being approximately 200 or more, so
16 if you could point that out in your oral argument. Assuming
17 that you can show support for that, then, you know, I think
18 you'd be able to meet numerosity.

19 Now, with regard to commonality, the plaintiffs identify
20 several common questions regarding the defendants' alleged
21 violations of Title IX. The fact that the named plaintiffs
22 participate in a different sport than others in the class does
23 not defeat commonality. Court notes in *Foltz v. Delaware State*
24 *University*, it's a Delaware case in the District of Delaware,
25 269 F.R.D. 419, it's a 2010 case. There, 15 of the

1 university's 21-member women's equestrian team initiated the
2 action on behalf of themselves and other similar situated
3 female athletes at the university. The fact that they were on
4 the equestrian team and they brought it on behalf of all these
5 other women athletes who participated in various and sundry
6 sports, the court there found that the fact that they were
7 equestriennes and complaining of the university's intent to
8 shut down the equestrian team did not defeat the fact that
9 their claims were common with typical females who participated
10 in other sports.

11 So as the court understands the complaint that's been
12 filed here, even though the named plaintiffs may play a
13 different sport than many of the other females who play sports
14 at Campbell High School, the common question as to all of them
15 is in terms of sports equipment, locker room availability, the
16 school support of their type of sport, and opportunities
17 afforded to them and their coaches.

18 So I'm inclined to find it is common with and typical of
19 females who compete in high school sports at Campbell High
20 School.

21 With regard to adequacy, I'm inclined to find there are no
22 conflicts of interest among the proposed class members which
23 would preclude the named plaintiffs from meeting
24 Rule 23(a)(4)'s adequacy requirement.

25 Now, there is also, you know, request for injunctive and

1 declaratory relief, so the class plaintiffs have to meet
2 Rule 23(b)(2) requirements. As the Ninth Circuit has
3 explained, Rule 23(b)(2) requirements are as stated in
4 *Wal-Mart Stores, Inc. V. Dukes*, "And where members of a
5 putative class seek uniform injunctive or declaratory relief
6 from policies or practices that are generally applicable to the
7 class as a whole, then typically Rule 23(b)'s requirements are
8 met," and I'm inclined to find that here so with regard to the
9 Rule 23(b)(2).

10 And lastly, I'm inclined to appoint lead counsel for
11 plaintiffs, specifically ACLU Foundation.

12 So that's the court's inclination. It is an inclination.
13 I set forth my inclination to give you an idea what I'm
14 thinking about and particular things I'd like you to address;
15 however, I acknowledge you know the case much better than I do
16 and you have prepared all the exhibits and the declarations, so
17 if there's something that you believe I've missed or that I
18 should take a second look at, I would ask you to mention that
19 in oral argument so that I can go over that information.

20 Given my inclination, though, I'm going to ask the
21 defendants first to address the court's inclination, and then I
22 would like the plaintiffs -- you're welcome to argue whatever
23 you want to -- but I'd like you to address my question with
24 regard to numerosity.

25 All right. Mr. Moser.

1 MR. MOSER: Your Honor, the first point in the
2 Court's inclination was the applicability of the inherently
3 transitory exception to mootness, and I hope I do this in the
4 order I should do it, but I'd like to address that first.

5 Of course, that's part of the plaintiffs' argument in
6 their reply memo that the inherently transitory exception to
7 mootness applies to the claims made by A.B. and T.T.

8 It's the Department of Education's position that that
9 exception is irrelevant because both A.B. and T.T.'s claims
10 fail for the same reasons as A.M.B.'s claim.

11 And just to maybe get to the point as to why I believe
12 those claims fail -- and I'm bearing in mind the Court's
13 inclination as to commonality -- A.B. and T.T. played water
14 polo at the same aquatic center where there is no argument that
15 there's disparity between the girls' and the boys' facilities.
16 So what I'm getting at is that it's our position that A.B. and
17 T.T. did not have claims in their own rights.

18 And if I might back up, I would say that to be a class
19 representative, a named plaintiff must have a claim in her own
20 right and be a member of the class. A.B.'s claim must be
21 complete in and of itself and she cannot bootstrap any of the
22 elements off other putative class members.

23 As I said, A.B. plays water polo, and both the girls and
24 boys at Campbell High School use the facilities at the K. Mark
25 Takai Veterans Aquatic Center in Waipio. A.B. has not pled

1 disparity between the girls' and the boys' facilities there nor
2 is there, in fact, any disparity between the facilities there.

3 A.B. is not receiving a program that is inferior to
4 similarly-situated boy athletes.

5 Now, A.B. has submitted a declaration from a Campbell High
6 schoolgirl who plays soccer, and she is the subject of the
7 pending motion to file a Second Amended Complaint. In that
8 declaration, that girl, identified as by initials A.P., states
9 that she, "as a soccer player receives unequal treatment
10 compared to the boys at Campbell who play soccer," and that
11 declaration might have supported class certification if A.B.
12 herself stated the claim in her own right. But A.B. can't rely
13 on other putative class members to fill in the holes in her
14 claim.

15 THE COURT: Agreed. But if you look at her
16 declaration, she clearly states about the mistreatment of
17 playing time, the practice facilities -- this is at
18 paragraph 14 of her declaration.

19 MR. MOSER: Your Honor, if I may, I'm sorry -- very
20 sorry to interrupt. Are we referring to A.M.B.'s declaration
21 or A.P.'s declaration? I just want to make sure I'm looking at
22 the right thing.

23 THE COURT: Oh, okay. A.B. You're saying A.B.
24 cannot meet the --

25 MR. MOSER: A.P. I'm sorry --

1 THE COURT: Oh, I'm sorry.

2 MR. MOSER: Yeah. The new -- well, potential new
3 plaintiff in the case, A.P., as in Paul. She's the young woman
4 who plays soccer, and her declaration was submitted after the
5 fact in support of a motion for class certification.

6 But my contention is that --

7 THE COURT: Well, you're talking about water polo,
8 right?

9 MR. MOSER: That's where A.M.B. plays.

10 THE COURT: Right.

11 MR. MOSER: And my argument is that because there's
12 no disparity at the water polo facility or the aquatics
13 facilities, the best that A.M.B. is able to do is get a
14 declaration from another young woman named A.P., as in Paul,
15 who says essentially that the soccer facilities for the girls
16 aren't the same --

17 THE COURT: Right. So I'm talking about A.B. She
18 brings claims on her own with regard to water polo that she
19 has --

20 MR. MOSER: Yes.

21 THE COURT: -- that's inherently transitory.

22 MR. MOSER: Yes, if she had a claim in her own
23 right.

24 THE COURT: That's what I'm saying. She has a claim
25 in her own right, though.

1 MR. MOSER: And I guess that's where we differ.

2 THE COURT: Yeah.

3 MR. MOSER: And of course --

4 THE COURT: So that's why I asked you to look at
5 A.B., as in boy's, declaration or affidavit, right?

6 MR. MOSER: And I'm sorry. Paragraph 14 was it,
7 Your Honor?

8 THE COURT: Paragraph 14, paragraph 15,
9 paragraph 16, 17. So there she makes specific -- or she gives
10 specific testimony with regard to unequal treatment of girls'
11 water polo team and girls' sports. Specifically as to the
12 water polo team, she was saying, "The practice facilities are
13 never booked on time, never up to par. Every year we started
14 practice without a pool on time and also practice right next
15 door to our competitors. Our equipment was not up to
16 regulation. It was a constant safety hazard. The water polo
17 goals were never provided by Campbell," paragraph 16,
18 "inconsistent coaching," and so forth.

19 So that indicates more of a policy and -- I mean, even
20 though they have the same pool facility as the boys, the issue
21 that she seems to raise is that the provision of -- that there
22 was a policy not to provide them with equal footing in terms of
23 availability of the pool, equipment, et cetera. So I'm trying
24 to understand your position that she doesn't at least raise an
25 arguable claim on her own behalf.

1 MR. MOSER: Well, I guess that's all that I can say
2 about that, what I've already said. Perhaps counsel for
3 co-defendant might maybe fill in some of that -- the blanks
4 that I might have left.

5 THE COURT: Okay.

6 MR. MOSER: If I may, Your Honor, there is one other
7 thing that I'd like to say. It's not specifically a point
8 which the Court raised in its inclination, but it's with regard
9 to the proposed class definition, and the Court has already
10 read what the proposed class definition is.

11 We think that the class is not adequately defined or
12 ascertainable based on objective criteria. As the Court notes,
13 the proposed class includes all female students at Campbell
14 regardless of whether they -- the athletic needs of both sexes
15 are being accommodated equally and regardless whether there is
16 no disparity between the girls' and boys' programs, and we've
17 already kind of talked about the aquatic center.

18 As the Court knows, Rule 23 requires a court's
19 certification order to define the class and class claims issues
20 or defenses; of course that's Rule 23(c). So in addition to
21 the certification prerequisites, the four which have already
22 been laid out by the Court, in *Lilly v. Jamba Juice*, which is a
23 case from the Northern District of California, the court said,
24 "While it is not an enumerated requirement of Rule 23, courts
25 have recognized that in order to maintain a class action, the

1 class sought to be represented must be adequately defined and
2 clearly ascertainable." And I don't think there's any, you
3 know, dispute about that amongst anybody.

4 In Moore's Federal Practice, if I might quote from there,
5 it says, quote, "Although the text to Rule 23(a) is silent on
6 the matter, a class must not only exist, but the class must be
7 susceptible of precise definition. There can be no class
8 action if the proposed class is 'amorphous' or 'imprecise.'"
9 So the criteria must be objective.

10 And finally, one other case from the Eastern District of
11 California which came out a little earlier this year, case
12 called *Wilcox v. Swapp* --

13 THE COURT: Is this in your brief?

14 MR. MOSER: I'm afraid it is not.

15 THE COURT: Yeah, then I cannot let you argue it.

16 MR. MOSER: All right.

17 THE COURT: You can ask me to provide a
18 supplemental, but I don't recall it in your briefing.

19 MR. MOSER: Okay. Well, essentially, I guess what I
20 would say is that a class definition has to be based on
21 objective criteria. So when you have something like the
22 proposed class definition here, it says in part, quote, "or
23 were deterred from participating in athletics at Campbell."
24 That is subjective criteria. And deterred by whom? Deterred
25 by what? This is precisely the kind of criteria that would

1 make an unmanageable class, so we think the Court should reject
2 the class in its proposal.

3 Thank you. That's all I have at this point.

4 THE COURT: All right. Thank you.

5 Ms. Nakamura?

6 MS. NAKAMURA: Thank you, Your Honor. If I could
7 ask your indulgence, I know in your inclination you didn't
8 necessarily --

9 THE COURT: Wait. I'm sorry, Ms. Nakamura.

10 Can you hear her?

11 We're going to take a brief recess and we're going to have
12 our IT person come up.

13 (Brief recess.)

14 THE COURT: All right. We're back on the record.

15 All right. The record will reflect the presence of
16 counsel.

17 Ms. Nakamura, your argument.

18 MS. NAKAMURA: Thank you.

19 As I was saying, I know the Court's inclination did not
20 specifically reference standing and addressed mostly mootness,
21 but if I could ask for a brief indulgence to discuss some
22 standing issues.

23 THE COURT: Yes.

24 MS. NAKAMURA: The class definition as stated in the
25 moving papers is "all present and future Campbell female

1 students and potential students who participate, seek to
2 participate, and/or are or were deterred from participating in
3 athletics at Campbell High School."

4 Now, as a putative class representative, A. -- they must
5 be -- A.B. and T.T. must be members of that class. Having
6 graduated from Campbell High School, they are, in fact, no
7 longer members of the class.

8 As it -- as counsel pointed out, DOE counsel pointed out,
9 in *Allee v. Medrano*, "A named plaintiff cannot require standing
10 through the back door, essentially bringing an action on behalf
11 of others that would have suffered -- that -- who suffered an
12 injury that would have afforded them standing had they been
13 named plaintiffs."

14 Now, this becomes particularly significant because while
15 plaintiffs argue that standing is measured at the time of the
16 filing of the complaint, and even if A.B. and T.T. lose
17 standing, they can still continue to be named plaintiffs.

18 But in situations where plaintiffs seek injunctive relief,
19 like here, the plaintiff must demonstrate that they
20 are -- there is a sufficient likelihood that they will again be
21 wronged in a similar way. A case on point would be *City of*
22 *Los Angeles v. Lyons* which involved a plaintiff where the court
23 found that he lacked standing to pursue injunctive relief
24 against the police where he was unable to demonstrate that
25 there was a likelihood that he would again suffer from future

1 chokeholds.

2 Similarly, in *Mansourian v. Regents* citing *Flint v.*
3 *Dennison*, the court held that, "Generally, once a student
4 graduates, he no longer has a live case or controversy
5 justifying declaratory or injunctive relief."

6 Now, with respect to plaintiff A.M.B. who is not graduated
7 but a -- I believe a sophomore at Campbell High School, it is
8 the defendant's position that she is not a member of the class
9 because the conduct she is complaining about has since been
10 rectified.

11 Further, in A.M.B.'s own declaration at paragraph 10, it
12 states, "I learned about some of the ways that female athletes
13 are treated unequally through my exposure to the problems that
14 my older sister, A.B., and the water polo team experienced over
15 the past few years. For example, I saw how the water polo team
16 had to practice at the beach because they did not have access
17 to a practice pool. I always see the female athletes carrying
18 their sports gear around campus all day, but I never see male
19 athletes carrying their stuff around all day." Now, notably
20 A.M.B.'s declaration does not state that she herself has
21 experienced these issues, but that they're experiences she
22 observed through A.B. and T.T.

23 Now, with respect to the Court's point regarding mootness,
24 while the Court's inclination is that the offenses claimed here
25 are inherently transitory, essentially capable of repetition

1 yet evading review, the holding in *Sosna v. Iowa* is relevant
2 here. There the court held that, "A litigant must have a live
3 claim at the time the class is certified; therefore, to prevail
4 on the instant motion, the plaintiffs must be members of the
5 class," which is our position that none of them are.

6 Now, specifically prior to class certification, the class
7 itself has no legal status outside of the interests of the
8 plaintiff. Therefore, once class certification is granted, the
9 class then retains legal status separate from the plaintiff,
10 and the class then may continue despite the named plaintiffs
11 having either standing -- lost standing or being moot.

12 Today the class is not certified and therefore it has no
13 legal status outside of the plaintiffs' lack of standing and
14 mootness issues, which would allow the class action to proceed
15 without the named plaintiffs.

16 Particularly on point for mootness is a case *Kuahulu v.*
17 *Employers insurance of Wausau*, 557 F.2d 1334, (9th Cir. 1977).
18 There the court held that where a class was not certified
19 before an appellant's claim became moot, the court is required
20 to dismiss the entire appeal as moot. Now, if you look at the
21 facts of that particular case, it involved the withholding of
22 disability benefits that the plaintiff were -- or they were
23 withhold or discontinued. Now, the state decided during
24 appeals process that it would, in fact, reinstate the
25 disability benefits, essentially mooting Mr. Kuahulu's claims.

1 Now, this injury is very similar to what is being asserted
2 here where, such as here, the injuries complained about have
3 been resolved, such as a locker room being revised to include
4 both male and female teams, and equipment having since been
5 remedied or new equipment having been provided. Both
6 situations can fall under the definition of capable of
7 repetition but evading review --

8 THE COURT: Yes, but on point is *In Re: National*
9 *Collegiate Athletic Association Athletic Grant-In-Aid Cap*
10 *Antitrust Litigation v. National Collegiate Athletic*
11 *Association* which is a Northern District of California case.
12 And there the same thing happened with regard to this. And so,
13 "On a motion to seek class certification, if a plaintiff's
14 claim becomes moot before the district court certifies the
15 class, the class action normally also becomes moot. However,
16 under the inherently transitory exception to mootness, a
17 district court may certify a class even though the plaintiffs'
18 representatives' claims are moot. When the claims are so
19 inherently transitory that the district court will not have
20 enough time to rule on a motion for class certification before
21 the proposed representative's individual interests expire and
22 such claims will repeat as to the class because other persons
23 similarly situated will have the same complaint."

24 There, factually, it's very close to this case. It was
25 litigation against the National Collegiate Athletic

1 Association, the NCAA, based on allegations that the NCAA
2 conspired to impose a cap on the amount of compensation schools
3 could provide to student athletes, so they had class
4 representatives or three separate classes.

5 But similarly, as here, you know, there were going to be
6 students who were going to graduate, and that's what happened.
7 She had standing at the time because she was a student. Since
8 then she's graduated. That's going to happen with --
9 eventually, God willing, all members of the class will be
10 graduating from high school, right? So that's the whole
11 transitory nature.

12 So even though it becomes moot, maybe they made, you know,
13 changes in the policy and so forth as to the water polo team,
14 but because they're at least making the allegations that it's
15 systemic, that these policies are denying other female athletes
16 access to locker rooms and travelling outside the state and so
17 forth, those are always capable of repetition yet evading
18 review, right?

19 And so even though I agree with you, the general rule is
20 if the class plaintiffs' claims become moot, then it moots it
21 out before you can certify the class, where we are now. But I
22 think that's the whole point where I sort of led with that
23 transitory mootness because I don't think standing's the issue,
24 quite frankly, and that's why I didn't address it, but I think
25 mootness is.

1 But when I look at the education cases, both this case,
2 the Northern District case, the Delaware State University case,
3 this Utah case, Jordan District -- School District which
4 involves a group of female students who want more athletic
5 opportunities, including a football team, at their high
6 schools, that's what they were suing for. It's the same kind
7 of situation 'cause you have these girls who can only
8 participate for four years. So at some point, depending how
9 the litigation moves along, you know, they're going to graduate
10 and it'll become -- their claims will become moot, but then the
11 issue still remains, the policies.

12 So I agree with you that the general rule is it's moot as
13 to the named plaintiff, but it's that transitory nature of it.
14 So when I look at the education cases as opposed to insurance
15 benefits or something, is there -- is there an education case,
16 a student athlete education case that you can point to me that
17 says no, that's not inherently moot or transitory in nature so
18 that you have this exception to the mootness rule?

19 MS. NAKAMURA: At the moment I don't have one with
20 me. If I do find one, if I may be allowed to submit
21 supplemental --

22 THE COURT: Absolutely. Sure. And I think
23 Mr. Moser wanted to submit something on the case that he didn't
24 cite in his brief but wants to rely on.

25 MS. NAKAMURA: Thank you.

1 With respect to the point the Court made regarding
2 numerosity, OIA would also like to point out that in addition
3 to not establishing where the 200 to 278 number came from, also
4 the plaintiffs have not provided any evidence regarding how
5 many girls seek to or -- and/or are deterred from participating
6 in athletics in Campbell. As that is a portion of their own
7 class definition, they are also required to provide some sort
8 of statistical evidence or testimonial evidence regarding that.

9 Now --

10 THE COURT: So let me ask you on that. If they can
11 provide support for the number as to female student athletes
12 who have been denied equal access to practice facilities,
13 opportunities, et cetera, but they cannot show anything as to
14 those who have sought or been deterred student athlete
15 experiences, would you agree then that the class can be
16 certified as to those female student athletes who have been
17 denied or who are making a claim that they've been denied
18 athletic opportunity?

19 MS. NAKAMURA: Yes, Your Honor. If they are able to
20 provide the sufficient evidence as to the first prong that you
21 discussed and the class definition is therefore then narrowed
22 or tailored to what they can establish at class certification,
23 then, yes, then the class at least on the numerosity prong
24 could be certified.

25 THE COURT: All right. I think you're right, yeah.

1 MS. NAKAMURA: Now, with respect to the adequacy of
2 representation, I believe that the plaintiffs have kind of
3 missed the point of the OIA argument. We do understand that a
4 class -- or a Title IX class action would require an analysis
5 of a program-wide situation; however, with respect to the
6 adequacy and also inherently the typicality of the claims
7 named, the claims of water polo or swimming students -- or
8 female athletes would not adequately -- or are typical of the
9 other class members.

10 Now, the purpose of the class action is to -- it was
11 designed to be an exception of the usual rule that would allow
12 only a named plaintiff to pursue their own interest, the goal
13 being to save judicial resources and litigate issues
14 potentially affecting every class member.

15 THE COURT: Right.

16 MS. NAKAMURA: So, as such, the fortunes of the
17 plaintiff become the fortunes of the class members.

18 THE COURT: Right. But even though they're asking
19 for specific things that are specific to soccer that may not be
20 identical to softball or another sport, they are talking about
21 funding, unequal policies, access to equipment, access to -- or
22 opportunities to travel outside Oahu to compete, venues.

23 So, you know, nobody's going to have a water polo, you
24 know, tournament at, you know, Aloha Stadium, so I don't think
25 they have to have that exact thing. But they're claiming that,

1 you know, there's a disparity in general in sort of the
2 elite -- or the more, I guess, elite locales for the
3 competitions -- right? -- for the boys and the girls in a
4 particular sport. But that doesn't mean that means only Aloha
5 Stadium. I mean, they're meaning comparable with regard to
6 that.

7 So it doesn't have to be identical. It's typical, right?
8 It's typical. So it's a policy that is treating -- at least
9 based on their allegations -- are treating the boys' and girls'
10 teams in a disparate fashion -- right? -- differently,
11 and -- and not marginally differently, but significantly
12 differently in terms of quality, access, et cetera.

13 So I understand what you're saying, but I'm not persuaded
14 like only the softball girls get to be part of a class and then
15 there's not enough water polo girls, so they can't be a class.
16 That can't be it 'cause they're attacking policies that the DOE
17 and the OIA have that goes throughout girls' sports versus
18 boys' sports.

19 MS. NAKAMURA: My point is that there are specific
20 and unique defenses with respect to the water polo and swimming
21 teams that would inherently distract from these putative class
22 representatives from adequately representing the class as a
23 whole, because there are unique defenses, like, for example,
24 the lack of a swimming pool facility. As Mr. Moser pointed
25 out, there is no swimming pool at Campbell High School and

1 therefore both the male and female swim teams have to practice
2 off-site. And further, there is not even a boys' water polo
3 team to compare the girls in a, quote/unquote, inequities to.

4 THE COURT: Right. But doesn't have to
5 be -- Title VII's[sic] not -- doesn't only limit you to a exact
6 sport requirement, because there's no girls' football team
7 either. But you can't give the boys' football team a billion
8 dollars and all the equipment they want and, you know, let them
9 play at Aloha Stadium every time, and then you let the girls'
10 soccer team, you know, play, you know, on some back lot
11 somewhere with no lights, or -- you know what I mean?

12 But, yeah, they don't have a football team, but you have,
13 you know, another sports team that you're treating in a
14 disparate way. I think Title IX would cover that. I mean, you
15 don't have to have, you know -- you can have a girls'
16 equestrian team but you don't have a boys' equestrian team
17 because there's no interest in it, but that doesn't mean that
18 you can give the girls' equestrian team super-duper treatment
19 and not -- and then discriminate against the boys' wiffle ball
20 team based on, you know, you don't value that as much. You
21 have to give equal opportunity and access, and that's what
22 they're asking.

23 I do agree with you on that seek and were deterred from.
24 I have a problem with that also with the numerosity, but...

25 MS. NAKAMURA: Okay. And understanding the Court's

1 position, I would like to, just to clear the record,
2 distinguish the instant case from the moving papers of
3 plaintiffs with respect to the citation of *Foltz v. Delaware*.

4 The speculative argument that is put forth in *Foltz* was
5 that if the university otherwise satisfies the obligations
6 under Title IX, then at that point it will become possible that
7 the named plaintiff will not adequately represent the interests
8 of the class and maybe abandon their stated commitment. That
9 is not what the defendants are arguing here. We're simply
10 arguing that there are unique defenses and strategies
11 particular to the current status of the named plaintiffs that
12 would detract from and defeat the prong of adequate
13 representation.

14 THE COURT: Well, then once the class is certified,
15 they can always seek to have another class representative,
16 right? So just because you have certain defenses to the class
17 plaintiff, though, doesn't really put her in conflict to the
18 others, in other words, all the water polo plaintiffs, because
19 you might have a defense saying, hey, you know, we're not
20 required to spend a million dollars to build you a new pool,
21 you know, and the boys don't have that too, so we're not in
22 violation of Title IX. That might be a defense, but that
23 doesn't necessarily place her in conflict with the other
24 plaintiffs because the other plaintiffs are also owed a certain
25 duty under Title IX -- right? -- vis-à-vis their sport.

1 So it doesn't put them in conflict with one another, and
2 that's really what the case law goes to with regard to, you
3 know, the conflict aspect of the class representative.

4 MS. NAKAMURA: And to that point, I would note that
5 there -- in the moving papers with respect to supporting that
6 there are other class members of this, the moving papers only
7 have declarations as to the named plaintiffs as -- and their
8 parents. There are cases in which they -- the courts have used
9 the lack of any declarations from a putative class member or
10 several putative class members to find that the named
11 plaintiffs have not met the elements of typicality and adequate
12 representation.

13 THE COURT: Okay. Thank you.

14 MS. NAKAMURA: Thank you.

15 THE COURT: All right.

16 MS. KRISTEN: Good afternoon, Your Honor.

17 THE COURT: Good afternoon. If you could just speak
18 into the microphone. We're having some difficulty and I want
19 to make sure --

20 MS. KRISTEN: Can you hear me?

21 THE COURT: -- our court reporter -- thank you.

22 MS. KRISTEN: Thanks.

23 This civil rights case is about ensuring the girls at
24 Campbell High School finally get that level playing field that
25 they were promised almost 50 years ago. And I very much

1 appreciate Your Honor's inclination to grant class
2 certification here and your sophisticated understanding of the
3 way in which Title IX works as a total programmatic analysis.

4 As you know, plaintiffs have presented three Title IX
5 claims here. The first has to do with equal treatment and
6 benefits, and that necessarily requires a total program
7 analysis.

8 The second has to do with equal participation
9 opportunities, also looks at the entire athletic program and
10 whether girls and boys are getting a fair share of those
11 athletic resources.

12 And finally, we have a claim for class-wide retaliation.

13 All of these claims are appropriate for class treatment
14 and other district courts within the Ninth Circuit have
15 certified classes with the identical definition that's
16 presented here. I'm happy to talk further about some of the
17 definitional issues, if you like, Your Honor, but I did want to
18 get to your specific question around numerosity. And I know
19 you wanted to know a little more about where those numbers came
20 from with respect to the number of athletes.

21 And, of course, had defendants contested our numbers in
22 any way in their opposition, we certainly would have put in
23 more information in our reply brief. So I apologize that Your
24 Honor feels that there could have been a little bit more on
25 that.

1 But if you look at Exhibit B to my declaration in the
2 moving papers, we've provided documents that we received from
3 the DOE in response to a UIPA request.

4 THE COURT: Right, right, I did see that. I did see
5 that Exhibit B, but, quite frankly, I'm not going to count up
6 all these numbers.

7 MS. KRISTEN: Understood, Your Honor.

8 THE COURT: Count how many were the girls and how
9 many were the boys.

10 MS. KRISTEN: So what we did is we did count up all
11 the numbers and we had to make some assumptions because the
12 defendants did not provide us with complete data. Despite
13 initiating discovery since January, we still have not gotten
14 the participation data that's as complete and accurate as we
15 would like it and --

16 THE COURT: So where is it in your affidavit or
17 declaration how many girls based on this Exhibit B?

18 MS. KRISTEN: What I put in -- in my declaration in
19 paragraph 7 was just the documentation and where the
20 documentation came from with respect to Exhibit B. And so I
21 understand Your Honor's point that you really wanted to learn
22 more about the methodology and how exactly these numbers came
23 about, and we can certainly provide a supplemental declaration,
24 if that is something that would be helpful to the Court.

25 THE COURT: Well, it won't be helpful to me. It'll

1 be fatal to your case because you folks have the burden of
2 proving that you meet each of the requirements, and numerosity
3 is right up there with the number one requirement.

4 So, you know, I'll give you leave -- I'm going to give
5 them leave too -- to further supplement the record, but so I
6 would specifically want you to do that because without that
7 information, it's just there unsupported and then I couldn't
8 rely on that. So...

9 MS. KRISTEN: I understand that Your Honor has an
10 independent obligation to satisfy yourself that we've met the
11 numerosity requirement. We do not believe that numerosity was
12 contested here, but we will be happy to supplement the
13 record --

14 THE COURT: Well, it's not -- I don't know if it's
15 contested, but clearly Rule 23 requires you folks to prove each
16 of the requirements of Rule 23. So just because they're
17 willing to accept that or they're challenging it on other
18 grounds doesn't let you slide on what your requirement is under
19 the law.

20 MS. KRISTEN: I understand your point, Your Honor.

21 THE COURT: Okay. So what about the other aspect
22 that we're talking about? They're saying that you're overbroad
23 in terms of the class that you're asking to certify; that I
24 think Ms. Nakamura -- and I thank her for conceding that -- if
25 you can show the numbers, then those current and future female

1 athletes who would participate, who have or would participate
2 in sports -- if you can show that number basis for it, that
3 would meet numerosity for that.

4 But she was saying -- or what I took her argument to be,
5 that the other part of what you're seeking certification on,
6 those who attempted or were deterred from participating,
7 there's no evidence how many girls that was, and isn't that
8 something that's so speculative it can't be captured and
9 therefore I can't certify the class as to those girls? Or are
10 you seeking those girls?

11 MS. KRISTEN: Yes, Your Honor, we are seeking those
12 girls and we do believe that there is evidence in our motion
13 with respect to girls that were cut from teams. Now, I -- I
14 concede that we don't have the exact specific numbers because
15 the defendants have not provided that information, but there
16 were cuts of girls in volleyball and softball, possibly soccer
17 and basketball. There was -- there was information in our
18 motion that girls were participating in a jujitsu club that was
19 disbanded that possibly could have become an interscholastic
20 sport.

21 And the defendants have -- have not produced any evidence
22 that they've ever surveyed girls, but our belief is that girls
23 are interested in playing sports and that they're deterred.
24 And some of our clients' declarations say that because these
25 facilities are so bad, girls are deterred from playing sports.

1 They don't want to go out for the team, they don't have access
2 to these locker rooms.

3 While we don't have a precise number, I don't believe that
4 that's what's required, especially when we're also talking
5 about future girls where joinder is impractical.

6 So we believe that the evidence that we presented so far
7 with respect to the facilities, with respect to the named
8 plaintiffs, the putative class members about the terrible
9 conditions that they're enduring in the athletic program show
10 that girls are deterred in sufficient numbers -- in addition to
11 the girls that are participating in athletics -- to satisfy
12 numerosity.

13 THE COURT: Well, okay. I'm not persuaded with
14 regard to that because that seems too speculative to me. I
15 mean, it does make common sense that if you have really junk
16 facilities that a lot of girls are going to look at that and
17 think I rather play AYSO or club ball or whatever than play
18 interscholastic sports. I get that. That makes sense on a
19 common sense level.

20 But I can't find numerosity based on, well, that makes
21 sense. So, you know, there's -- what? -- 1490 girls and of
22 that there's 200 female athletes, so that leaves 1200 that
23 might have participated in some kind of sport? I can't -- I
24 mean, I don't think the law allows me to do that. So I'll let
25 you do additional briefing with regard to that as well.

1 MS. KRISTEN: Thank you, Your Honor. I appreciate
2 that.

3 And then just with respect to the ascertainability issue,
4 I understand there may be some supplemental briefing on that,
5 but I do believe that there's a Ninth Circuit case that has
6 come out in 2017 that makes it clear that in the Ninth Circuit
7 there is no such ascertainability requirement with respect to
8 class actions, and so I don't believe those cases that are
9 cited -- again, I didn't see them in the brief so I can't
10 address all of them -- but I don't believe those are relevant.

11 And then I would just -- if you have another moment, I
12 would like to turn this to my colleague, Mateo Caballero, to
13 address some of the standing and mootness arguments, if you'd
14 like to hear a little more argument on that.

15 THE COURT: Okay. I'm happy to hear it, but I don't
16 want you also to snap success -- snatch success -- or defeat
17 from the jaws of success. So proceed at your -- at your
18 leisure, but also having been forewarned, yeah.

19 MR. CABALLERO: Thank you.

20 THE COURT: Right now I'm persuaded that there's,
21 you know, inherent transitory mootness, but go ahead.

22 MR. CABALLERO: I'll be very brief, Your Honor.

23 I agree here the claims are inherently transitory because
24 plaintiffs graduate all the time, the class is changing, and
25 it's fluid; yet, the issues remain unaddressed.

1 And it's not just that, Your Honor. I would say it's also
2 a question of allowing seniors to bring these types of
3 lawsuits, otherwise, they wouldn't be able to ever -- you know,
4 not just Title IX, but all sorts of other civil rights statutes
5 wouldn't apply to seniors and they wouldn't be able to seek
6 injunctive relief.

7 And finally, you know, it would create all sorts of
8 perverse incentives if the inherently transitory exception did
9 not apply because, for example, you know, they could eliminate
10 a sport, just to, you know, get rid of standing, or get rid of
11 an injury, or they could cut someone from the team. And so
12 without that exception, you know, it does create all sorts of
13 perverse incentives on the part of DOE and athletic directors.

14 That's it. Thank you.

15 THE COURT: Thank you. I agree.

16 So let's talk about the briefing schedule then. How about
17 if I give plaintiffs a week to provide me the documentation
18 with regard to the number of female athlete students?

19 And there's something else you wanted to address as well?

20 MS. KRISTEN: It was the deterred issue, Your Honor,
21 and whether we could provide some additional information.

22 THE COURT: Yes, yeah. Exactly, yeah. So the basis
23 for your wanting the -- the basis of your support for including
24 in the class certification those girls who wanted to
25 participate but were unable to and/or were deterred, right,

1 from even going out for the sport.

2 So if I can have that in a week, which gives us to what
3 date?

4 THE COURTROOM MANAGER: September 26.

5 THE COURT: September 26th.

6 And then for the defense, if you could get to the court
7 and to counsel by that same date the additional citations and
8 positions that you folks were taking with regard today.

9 And then I'll give you both a week after that to respond
10 to the additional briefing that you folks have provided.

11 THE COURTROOM MANAGER: October 3rd.

12 THE COURT: October 3rd. And so brevity is the sole
13 of wit, so I do not want like a 50-page documentation on these
14 things. So I will ask you to keep it to 10 pages or less with
15 regard to any submissions, both the initial as well as any
16 response.

17 All right? Is there anything else that we need to address
18 on behalf of the plaintiffs, Ms. Kristen?

19 MS. KRISTEN: Yes, Your Honor. I just wanted to
20 clarify that 10 pages or less, would that also include any
21 exhibits that we might need to attach to show the numerosity?

22 THE COURT: No.

23 MS. KRISTEN: Okay. Thank you, Your Honor, for that
24 clarification.

25 THE COURT: Okay. Mr. Moser, anything on behalf of

1 your client, the DOE?

2 MR. MOSER: No. Thank you very much, Your Honor.

3 THE COURT: Ms. Nakamura, anything on behalf of your
4 client, the OIA?

5 MS. NAKAMURA: Nothing further, Your Honor. Thank
6 you.

7 THE COURT: All right. Well, I thank all of you for
8 the briefing and excellent oral argument. I wish you an
9 excellent afternoon and evening.

10 We're in recess. Good day.

11 (Proceedings concluded at 3:38 P.M.)

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COURT REPORTER'S CERTIFICATE

I, DEBRA READ, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that pursuant to 28 U.S.C. §753 the foregoing is a complete, true, and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, September 21, 2019.

/s/ Debra Read

DEBRA READ, CSR CRR RMR RDR